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No. — OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EMILE BLOUIN,

Petitioner,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are litigants under The Americans With Disabilities Act, 42 U.S.C.A. § 12101 through 12112, (hereinafter "ADA") being deprived of the right to a jury trial, granted by the Civil Rights Act of 1991, by trial courts under the color of this Court's directives in deciding motions for summary judgement? In order to survive a motion for summary judgment under the ADA, are plaintiffs required to produce evidence in excess of affidavits, depositions, and admissions that establish and track the exact requirements set forth in the Regulations implementing the ADA and the Interpretive Guidance issued for those regulations?

2. Has an individual produced evidence that he is substantially limited in one or more major life activities, within the meaning and intent of the ADA, and the regulations implementing that act, where a herniated lumbar disc, which does not require surgery, does, in the absence of some reasonable accommodation:

   (a) prevent the individual from lifting over thirty pounds;

   (b) prevent the individual from meeting the lifting requirements of his job class;

   (c) eliminate the individual from all classes of jobs requiring medium to heavy manual labor;

   (d) disqualify an individual from 83.9% of the jobs that require similar training, knowledge, skills, and ability of the individual to which he has reasonable access?

3. Has an individual presented sufficient evidence to establish that his employer regards or perceives him as having a "disability, within the meaning and intent of the ADA, when the employer transfers the employee to a less strenuous job because the employer believes that the in-

dividual will hurt himself if he continues to perform strenuous work in his present position?

4. Can an employer, who is a covered entity, abrogate the mandates and prohibition of The Americans With Disabilities Act, and in particular 42 U.S.C.A. § 12112 (a) and (b)(2), by means of a collective bargaining agreement, which pre-dates the ADA, with a labor union of which an employee with a disability is a member?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the case are as follows:

Emile Blouin, Plaintiff
Kaiser Aluminum & Chemical Corporation, Defendant

In addition to the parties to the case, the following is the list of parent companies and non-wholly owned subsidiaries:

Kaiser Aluminum & Chemical Corporation is a wholly owned subsidiary of Kaiser Aluminum Corporation

Kaiser Aluminum Corporation is a wholly owned subsidiary of Maxxam, Inc.

Maxxam Group, Inc. is a subsidiary of Maxxam, Inc.

Scotia Pacific Holding Company is a subsidiary of Maxxam, Inc.

Sam Houston Race Park, Ltd. is a subsidiary of Maxxam, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Emile Blouin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Per Curiam opinion of the Fifth Circuit Court of Appeals (App., *infra,*) is not reported. The opinion of the district court (App., *infra,*) is reported at 5 A.D. 546, 14 A.D.D. 66, 7 NDLRP 380, 1996 WL 19138 (E.D.La.).

JURISDICTION

The court of appeals entered its judgment on December 4, 1996. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

42 U.S.C. § 12112(a) provides in pertinent part:

> No covered entity should discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) construction
>
> As used in subsection (a) of this section, the term "discriminates" includes—
>
> * * * *
>
> (2)participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship can include a relationship with a . . . labor union);

42 U.S.C. § 12102(2) defines "disability" as follows:

> The term "disability" means, with respect to an individual—
>
> (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (b) a record of such an impairment; or
>
> (c) being regarded as having such an impairment.

42 U.S.C. § 12111 defines "qualified individual with a disability" as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the

employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants with a job, this description shall be considered evidence of essential functions of the job.

42 U.S.C. 1981a(c) provides in pertinent part:

(c) Jury Trial—If a complaining party seeks compensatory or punitive damages under this section—

(1) Any party may demand a trial by jury;

29 C.F.R. § 1630.2 defines "Major Life Activities" as follows:

(i) *Major Life Activities* means functions such as caring for one's self, performing manual tasks, walking, sitting, hearing, speaking, breathing, learning and working.

29 C.F.R.§ 1630.2(j) defines "substantially limits", as it pertains to the major life activity of working as follows:

(j) *Substantially Limits*—

(3) With respect to the major life activity of working—

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in a major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "*working*":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, in which the individual is also disqualified because of the impairment (class of jobs).

The Appendix to Part 1630 of C.F.R.—Interpretive Guidance on Title I of The Americans With Disabilities Act, § 1630.2(j) gives this construction for the term "Substantially Limits":

* * * *

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared to the ability of the average person with comparable qualifications to perform those same jobs. *For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs.* This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. (Emphasis added).

The Appendix to Section 1630.2(*l*) gives this instruction for understanding the term "Regarded as Substantially Limited":

* * * *

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

* * * *

> An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. *If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.* (Emphasis added).

The full text of all the pertinent regulations and statutory provisions are found in the Appendix to this writ, *infra* at 15a.

STATEMENT OF THE CASE

A. Proceedings and Dispositions Below

On February 10, 1995, plaintiff filed suit against his former employer, Kaiser Aluminum and Chemical Corporation ("Kaiser"), alleging disability discrimination in violation of The Americans With Disabilities Act ("ADA"), 42 U.S.C.A. §§ 13101-12117 (West Supp. 1994). The plaintiff alleged that he was disabled because he was either substantially limited in one or more major life activities, primarily that of working, or because he was regarded as having such an impairment by his employer.

The plaintiff has degenerative disc disease with a herniated lumbar disc. Kaiser's plant physician restricted him from continuous stooping, crouching, bending, lifting anything over thirty pounds, and restricted him to ground level work only. These restrictions disqualify plaintiff from performing any job classified as anything from "medium labor" to "heavy labor." As a result, he was reassigned to work in a different job, resulting in a reduction in salary of about $30,000.00 a year. The thrust of

plaintiff's Complaint was that Kaiser impermissibly discriminated against him because of his disability by transferring him from his position as a "split shift general repairman" to a "machine shop general repairman".

On December 5, 1995, Kaiser filed a Motion for Summary Judgment seeking a complete dismissal of plaintiff's case. The sole issue was whether the plaintiff had a "disability" under the ADA. (Pet. App. p. 4a-5a). The issue of whether the plaintiff could perform the essential functions of his job with "reasonable accommodations," was not a part of the defendant's motion, and hence, not at issue. The matter was noticed for hearing, *without* oral argument. The plaintiff filed in opposition to this motion depositions, affidavits, and admissions by defendant that satisfied the requirements of the regulation implementing the ADA and the Interpretive Guidance on Title I of the ADA. Notwithstanding, on January 18, 1996, the district court granted the defendant's motion. On January 23, 1996, plaintiff filed his Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. On December 4, 1996, again without plaintiff being afforded the benefit of oral argument, the Fifth Circuit in a *per curiam* decision, affirmed, stating only that "[W]e are persuaded that the district court reached the right result when it entered judgment for the defendant.". (Pet. App. 1a)

B. Statement of Facts

Emile Blouin began his employment with defendant, Kaiser Aluminum Company, in 1957, and, with the exception of a brief layoff in the late 1950's, plaintiff remained continuously employed there for approximately thirty-seven years. (Record, Vol. 1, pg. 39) He was employed as a general repairman. Kaiser's job description of a "general repairman" is classified as one requiring heavy lifting, and is applicable to all general repairmen throughout the plant. (Record Vol. 1, pg. 137-151). During the last ten years at Kaiser, because of his seniority, plaintiff became a "split shift general repairman" at

the Kaiser facility in Gramercy, Louisiana. (Record, Vol. 1, pg. 39 and pg. 90) From a financial standpoint, this was one of the highest paying jobs in the plant for non-management employees. Plaintiff's job assignment to the split shift provided him considerably more wages than a job assignment to a particular group of general repairmen at the Kaiser facility. This was an extremely desirable job assignment and one to which only the most senior general repairmen had access. (Record, Vol. 1, pg. 89-90)

On January 9, 1994, plaintiff strained his back while at work. (Record, Vol. 1, pg. 63) The plaintiff reported the incident, but worked the remainder of his shift. (Record, Vol. 1, pg. 63) That night, plaintiff's back pain worsened to the point where he required emergency treatment. (Record, Vol. 1, pg. 40) Plaintiff was prescribed five days bed rest and anti-inflammatory drugs by an emergency room physician. A few days later, plaintiff was examined by his treating physician, Dr. Edward S. Connolly, a neurosurgeon, who recommended two to three weeks of bed rest and no working. (Record, Vol. 1, pg. 78; Record, Vol. 1, pg. 78) Dr. Connolly diagnosed plaintiff as suffering from degenerative disc disease with a disc herniation at the L4-L5 level. (Record, Vol. 2, pg. 472) Plaintiff complied with Dr. Connolly's recommendations and did not report to work during that time period.

Shortly after returning to work, however, Kaiser instructed plaintiff to see the plant's physician, Dr. Peter Casten. Dr. Casten assigned physicial restrictions to the plaintiff, initially for a time period of thirty days. (Record, Vol. 2, pg. 468) In March 1994, Dr. Casten assigned permanent restrictions. These were "no continuous stooping, crouching, bending; no lifting over thirty pounds; ground level work only." (Record, Vol. 2, pg. 469; Pet. App. p. 2a, n.2) Later, Dr. Connolly agreed in writing with Dr. Casten's restrictions.

The restrictions by Dr. Casten prevent the plaintiff from performing not only heavy manual labor, but also medium work, as defined by the United States Department of Labor. The Department of Labor defines "heavy work" as "Lifting 100 lbs. maximum with frequent lifting and/or carrying of objects weighing up to 25 lbs." "Medium work" is defined as "Lifting 50 lbs. maximum with frequent lifting and/or carrying of objects up to 25 lbs." Being restricted from lifting more than thirty pounds disqualifies plaintiff from over 80% of the jobs which require the ability to do "medium work" to "heavy work" in the geographic area to which the plaintiff has access. A vocational rehabilitation counselor issued an opinion in the form of an affidavit in opposition to defendant's Motion for Summary Judgment, which stated that the plaintiff's restrictions would substantially limit his ability to find employment within the class of jobs for which he was otherwise qualified by reason of his education, training, and experience. With the plaintiff unable to perform even medium work, the vocational rehabilitation counselor was of the opinion that the plaintiff would experience an 83.9% loss in the relevant job market in the geographic area between Baton Rouge, Grammercy, and New Orleans, Louisiana, (Pet. App., pp. 11-12a), an area of heavy concentration of plants and industry in south Louisiana.

After these permanent restrictions were issued, Kaiser unilaterally and permanently reassigned and restricted the plaintiff to working within the machine shop. (Record, Vol. 1, pg. 82) Kaiser and its plant physician, Dr. Casten, believed that if plaintiff continued working as a split shift general repairman he would hurt himself, whereas he would not be faced with the same likelihood in the machine shop. (Record Vol. 2, pgs. 495-496; Pet. App. p. 14a) Although the plaintiff's job as a split shift repairman may at times require lifting over thirty pounds and bending, crouching, and stooping, and work above ground level, he believed and repeatedly assured his supervisors

that he could perform his job with the use of mechanical aids, lifting devices, and the help of co-workers. (Record Vol. 1, p. 124). As a result of this reassignment, the plaintiff filed a grievance with his Union. (Record, Vol. 2, pg. 470) In response to this grievance, Kaiser was unwilling to return plaintiff to his former job as a split shift general repairman, despite the fact that, with reasonable accommodation, the plaintiff could remain within his restrictions and still perform his job duties as a split shift general repairman. (Record, Vol. 2, pgs. 471-473) Dr. Peter Casten reconfirmed the plaintiff's permanent restrictions after a July, 1994 functional capacity evaluation ordered by Kaiser, which prompted plaintiff to file a second grievance. (Record, Vol. 2, pg. 492) From March of 1994 through December of 1994, plaintiff actively pursued the Union grievance process to no avail. Finally, fed up with the inability to obtain any relief or reasonable justification from Kaiser as to why he had been taken off his former job as a "split shift general repairman," and because it was financially imprudent to continue working as a machine shop general repairman, as opposed to taking retirement, plaintiff retired from Kaiser December 31, 1994. Plaintiff would never have retired at this point had Kaiser not reassigned him. (Record, Vol. 1, pg. 124) As a result of this forced retirement, Kaiser terminated the grievance process, effective January 1, 1995. (Record, Vol. 2, pg. 124)

REASONS FOR GRANTING PETITION

I. QUESTIONS OF EXCEPTIONAL AND RECURRING IMPORTANCE.

Plaintiff respectfully submits that extremely important issues to litigants under the ADA, as well as other cases in the Civil Rights arena, are presented by this petition for writ of certiorari. Not the least of these, is a growing tendency of trial courts, presented with motions for summary judgment in a Civil Rights case, to actually weigh the evidence, determine its credibility and sufficiency, and

then substitute its personal views for those of the jury. This is done on a very abbreviated record, without so much as oral arguments, and under the color of this Court's directives in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). The effect is, as feared by Justice Brennan in his dissent in *Anderson, supra*, that the merits of a case are being determined at a "paper trial", which then results in the right to a jury trial granted by the Civil Rights Act of 1991 being circumvented. Plaintiff submits that this issue, especially in Civil Rights cases, needs to be re-visited by this Court.

Moreover, the lower court's opinion and the Fifth Circuit's per curiam decision have ruled on an important question under the ADA, one that involves a substantial number of working Americans in every walk of life and work. Essentially, this question boils down to whether individuals with degenerative disc disease of the back, who are substantially limited in their ability to lift, stoop, bend, and crouch, are part of that group of forty three million Americans that Congress has determined are routinely discriminated against and in need of federal protection.

This issue has not been, but should be, addressed by this Court. It is an issue that is of exceptional importance and one that will recur time and time again in the American work place where a substantial number of working Americans suffer in varying degrees from degenerative disc disease of the lower back. Likewise, how the regulations which implement the ADA will be used and interpreted by courts in cases brought by individuals with permanent back conditions under the ADA is of extreme importance to litigants under the Act. The Fifth Circuit's decision not to publish its *per curiam* decision, does not lessen the importance of this issue. Cases will continue to arise under the ADA in the Fifth Circuit where individuals are substantially limited in their ability

to lift because of degenerative disc disease of the lower back.

The Regulations which implement the ADA specifically address the problem of back conditions that preclude an individual from heavy manual labor. Those regulations give a blueprint or guide to making this determination. The plaintiff met all the requirements of that blueprint, yet was denied the right to present his case to a jury. Allowing these cases under the ADA to be dismissed because of an erroneous understanding of the ADA, *e.g.*, a belief that a limitation cannot be substantial if the individual can perform some type of work, especially in the face of the regulations to the contrary, allows the very purpose of the Act to be thwarted.

A. Trial Courts Usurping Right to Jury Trial Under Civil Rights Act of 1991 Under Color of This Court's Directives for Deciding Motions for Summary Judgment.

Rarely in the adjudication of individual civil rights is the path of least resistance the correct one. Yet, with trial courts obtaining a nearly unfettered power of dismissal, and left unchecked for over a decade, this is indeed the path that has been most often followed when a court is faced with facts that probe the very fabric of its personal belief as to how far those individual civil rights should extend. Since this Court's divided opinions in *Celotex, supra* and *Anderson, supra*, there has been a growing tendency, especially in the Civil Rights arena, of lower courts exercising that nearly unfettered power of dismissal. Lower courts, paying lip service to the venerable words spoken by this Court that "all justifiable inferences are to be drawn in [non-movant's] favor", *Anderson, supra* at 255, have increasingly denied individuals the right granted by the Civil Rights Act of 1991, 42 U.S.C. 1981a(c) to present their case to a jury, by weighing the evidence, determining its plausibility, credibility, and sufficiency, and then substituting their opinion for that of the trier of fact.

Worse still, and in ever increasing numbers, this is done on the barest of records, in the face of direct evidence supporting the individual's claim, and often without affording oral argument to the individual.[1] A *Per Curiam* affirmation by the appellate court, without oral arguments and without written reasons, and the decimation of an individual's civil rights is nearly complete.[2] Armed with this Court's authorization in *Anderson, supra*, for district courts to "consider substantive evidentiary burdens" when deciding Motions for Summary Judgment, increasing number of Civil Rights cases are disposed of by the district court simply declaring, as done herein, that "Plaintiff provides no evidence" (Pet. App. p.), notwithstanding the existence of depositions, affidavits, and admissions in the record that say otherwise.

Justice Brennan's dissenting opinion in *Anderson, supra* at 266, has become a chilling prophesy fulfilled.

> But the Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would:
>
> * * * *
>
> If in fact, this is what the Court would, under today's decision, require of district courts, then *I am fearful* that this new rule—for this surely would be a brand new procedure—*will transform* what is meant to provide an expedited "summary" procedure

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[1] For example, the lower court herein cites *Saunders v. Michelin Tire Corp.*, 942 F.2d 301 (5th Cir. 1991) for the principal that a moving party who does not have the burden of proof need only "point to the absence of evidence supporting the essential elements of the opposing party's case". Yet, the court then determines there is this "absence of evidence", notwithstanding depositions and affidavits that track the essential requirements of the act and its implementing regulations.

[2] With the low percentages of writs of certiorari granted by this Court, the last word on an individual's case is usually that of the appellate court.

> *into a full-blown paper trial on the merits.* (Emphasis added).

Even more haunting, especially in this 'full-blown paper trial" of Civil Rights cases, the trial courts determination that affidavits, admissions, and depositions, which though squarely on point, are "no evidence", circumvents the right to a jury trial under the Civil Rights Act of 1991. In short, the lower court is given the nearly absolute power to say that what, in fact, exists, "does not exist", or in the face of affidavits and depositions, to simply say, that *"plaintiff has failed"* to produce the evidence needed to prevail at trial. That this is what is taking place in lower courts could not be clearer than it is in this case.

Plaintiff's complaint set forth two separate and distinct theories of "disability" under the act, 1) having an impairment that substantially limited one or more major life activities, and 2) being regarded as having such an impairment by his employer.

On the issue of "substantially limiting one or more major life activities", the lower court ruled as follows.

> The Court finds as *a matter of law* that plaintiff did not have an actual disability as defined by the ADA. *Plaintiff provides no evidence* that his impairment significantly restricted him from performing an entire class of jobs. (Pet. App. pp. 6a-7a; emphasis added.)

On the issue of "being regarded as having" such an impairment, the court held:

> There is no evidence that defendant considered plaintiff's impairment as subtantially limiting or that defendant doubted plaintiff's ability to perform the duties of a general repairman.

On the issue of "substantially limiting", the court acknowledged in footnote 2 of its ruling that the plaintiff had permanent restrictions of "No continuous stooping,

crouching, bending, no lifting over 30 pounds; ground level work only." (Pet. App. p. 2a)

The plaintiff referred the trial court to Dr. Casten's deposition wherein he admitted that the plaintiff "Should avoid *any class of job* that involves heavy lifting" and "repetitive bending and stooping he can't control." (Emphasis added, Pet. App. 14a). The Interpretive Guidance on Title I of the ADA, virtually foreshadowing this admission by Dr. Casten, instructs that a back condition which prevents heavy lifting *does constitute* a substantial limitation of the major life activity of working because the impairment eliminates "the ability to perform *an entire class of jobs.*"

> *For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs.* This would be so even if the individual were able to perform jobs in another class, *e.g.*, the class of semi-skilled jobs. (Appendix to 29 C.F.R. 1630.2(*l*); emphasis added).

Plaintiff also submitted the affidavit of a vocational rehabilitation counselor in opposition to the motion for summary judgment, who quantified the classes and number of jobs from which the plaintiff would be precluded because of his restrictions. She was of the opinion that the plaintiff's disability was a substantial limitation in plaintiff's ability to work. (Pet. App. p. 11a-12a). Being restricted from lifting over thirty pounds excluded the plaintiff from those jobs that would be classified as "medium work" to "heavy work". In the geographical area to which the plaintiff has access, his restrictions preclude him from 83.9% of the jobs for which he would otherwise be qualified to perform by reason of education, training, and experience. To say this is not evidence of a substantial limitation is to weigh and judge the credibility and plausibility of the evidence.

Moreover, the record contained Kaiser's own "Job Task Analysis for General Repairmen" and "Analysis of Upper Body Ergonomic Stressors for General Repairmen" (Record, Vol. 1, pg. 137-151). Under the section entitled "Job Description", the analysis states that "general repairmen are responsible for any number of repairs *throughout the entire facility*" (emphasis added). The description of tasks listed therein indicate that there are job tasks that require lifting in excess of the plaintiff's thirty pound restriction. These requirements apply to the entire class of Kaiser's "General Repairman", as they would to virtually every similar job for other employers in the geographic area.

Notwithstanding this quantity and quality of evidence of a substantial limitation, very nearly tracking the requirements set forth in the regulations implementing the ADA, the trial court ruled that *"Plaintiff produces no evidence* that his impairment significantly restricted him from performing an entire class of jobs." (Emphasis added) If the regulations concede that a back condition which precludes heavy lifting is indeed a "substantial limitation" and precludes an individual from "an entire class of jobs", then affidavits and depositions that establish that as a fact should prevent a granting of summary judgment—unless the trial court is indeed weighing the evidence and substituting its determination and its personal opinion for that reserved to a jury.

On the issue of "being regarded" as having a disability, it was uncontested that the plaintiff was reassigned to a less strenuous position because of his back condition. Defendant admitted this in its Answer to plaintiff's Request for Admission. (Record, Vol. 2, pgs. 506-507). The Interpretive Guidance on Title I of the ADA says that this is sufficient to establish that the employer would be regarding the individual as disabled.

> *If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the*

> *individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.* (Appendix to 29 C.F.R. 1630.2(k); emphasis added).

If all "justifiable inferences" are truly being drawn in plaintiff's favor, and if a written admission by the moving party is in fact competent evidence on a motion for summary judgment, then the reassignment of the plaintiff to less strenuous work should have been sufficient to establish that Kaiser regarded him as having a disability. The Interpretive Guidance to the ADA instructs that such an inference is not only "justifiable", but also sufficient to establish that requirement. The only conclusion that can be made is that the lower court, ignoring the Interpretive Guidance, and merely paying lip service to the oft quoted words of this Court in *Celotex* and *Anderson,* substituted its personal opinion as to what conclusions should be drawn from plaintiff's reassignment to less strenuous work, because of Kaiser's belief.

Plaintiff submits that it is time for this Court to revisit its directives in *Celotex* and *Anderson,* especially in cases under the Civil Rights Act of 1991, to ensure that, under the *"invitation—if not an instruction"* in those cases, trial courts are not derogating litigant's right to a trial by jury by weighing the evidence and deciding the merits of the claim on a "paper trial." Obviously, those directives have not given trial courts the necessary guidance, and has allowed the summary judgment procedure to degenerate into a derogation of plaintiffs' rights to a jury trial.

B. ADA, Regulations Implementing the ADA, and Interpretive Guidance on Title I of the ADA, Appendix to 29 C.F.R. Part 1630, Erroneously Applied.

The lower court's granting of defendant's Motion for Summary Judgment, and the Fifth Circuit's tacit approval, has essentially re-written the ADA, its regulations, and

the Interpretive Guidance on Title I of the ADA. The reasoning of the trial court and the Fifth Circuit in its *per curiam* decision in their application of the ADA and its implementing regulations will always preclude a finding of "disability" whenever the individual is able to perform some type of work because of what amounts to a "reasonable accommodation"—a clearly erroneous analysis under the ADA.

The trial court, and the Fifth Circuit in its per curiam affirmation, either completely disregarded or refused to give any weight to the Regulations implementing the ADA and the Interpretive Guidance found in the appendix to 29 C.F.R. Part 1630. In substance, the lower court, and the Fifth Circuit, determined that a lower back condition that prevented the plaintiff from bending, stooping, crouching, and lifting thirty pounds or more, and which restricted plaintiff to ground level work only, did not substantially limit one or more of the plaintiff's major life activities. The clear implication is that degenerative disc disease which disqualifies an individual from medium to heavy manual labor does not substantially limit the plaintiff from engaging in an entire class of jobs, notwithstanding the interpretive guidance under Appendix to 29 C.F.R. § 1630.2(j).

To reach those conclusions, both the District Court and the Fifth Circuit had to disregard completely the regulations at 29 C.F.R. 1630.2(i), 29 C.F.R. 1630.2(j), 29 C.F.R. 1630.2(*l*) and the Interpretive Guidance to those regulations. The ADA does not define the terms "*Major Life Activities*", "*Substantially Limits*", or "*is regarded as having such and impairment*", but rather, leaves that to the regulations implementing the Act. The Appendix to Part 1630, of 29 C.F.R.—Interpretive Guidance On Title I Of The American With Disabilities Act is instructive as to how those terms are to be construed and applied to cases under the ADA. They are directly on point here.

Section 1630.2(j) Substantially Limits.

An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. *For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment elminates his or her ability to perform a class of jobs.* This would be so even if the individual were able to perform jobs in another class, *e.g.,* the class of semi-skilled jobs. (Emphasis added).

Section 1630.2(*l*) Regarded as Substantially Limited in a Major Life Activity.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

* * * *

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. *If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.* (Emphasis added).

There was no dispute that plaintiff suffered from an "impairment" within the intendment of the Act. Both

Dr. Connolly and Dr. Casten were of the opinion that plaintiff suffered from degenerative disc disease with a right paracentral disc herniation at L4-L5. (Record, Vol. 2, pg. 472 and pgs. 495-496) Indeed, the lower court noted Kaiser's concession that plaintiff's back condition constituted an "impairment." (Pet. App. 5a) Under the statutory definition of "disability," then, the only remaining issues were whether plaintiff's "impairment" substantially limited a major life activity, or whether Kaiser perceived it as such.

1. *Substantially Limits a Major Life Activity.*

Plaintiff's back impairment presents the quintessential case of an impairment which substantially limits the major life activity of working. *In the absence of accommodation,* the plaintiff's impairment at a minimum disqualifies him completely from performing all those occupations which require heavy labor, an entire class of jobs. (Record, Vol. 4, pgs. 495-496) In fact, as Ms. Jennifer Palmer affirmed, the restrictions imposed by Dr. Casten would preclude Mr. Blouin from all jobs classified by the United States Department of Labor as medium, medium-heavy, heavy, and very heavy. (Record, Vol. 2, pgs. 501-502) It is difficult to imagine a more substantial limitation on the major life activity of working for someone whose work has always involved heavy lifting and manual labor by reason of his education, training, and experience.

The lower court and the Fifth Circuit have essentially ruled that because the plaintiff believed that he could perform his job with what would amount to a reasonable accommodation, that he was not disqualified from an entire class of jobs, and hence, not substantially limited in his ability to work. As seen, the Act's interpretive guidelines under Part 1630.2(j), categorically reject this logic.

The lower court ruled that plaintiff offered "no evidence that his impairment significantly restricted him from performing an entire class of jobs," and that "*as a matter*

of law," the plaintiff was not "disabled" within the meaning of the act. (Pet. App. pp. 6a-7a; emphasis added) In support of this ruling, the lower court points to the plaintiff's testimony that he believed he could perform his job as a split shift repairman, and that he did not consider himself disabled. This holding is erroneous. It makes it impossible to ever establish a claim under the ADA. For if plaintiff had claimed he was incapable of performing his job in any manner, he would not then be able to establish that he was a "qualified individual" under the Act. See *Cochrum v. Old Ben Coal Mine Co.*, 102 F.3d 908, at 912 (7th Cir. 1996).

This is not the case of plaintiff's inability to perform one particular aspect of the job of general repairman. Rather, the above-cited excerpt from the Interpretive Guidance on Title I of the Americans With Disabilities Act cuts directly to the core of the issue raised herein, *i.e.*, whether plaintiff's impairment substantially limits him in the ability to perform an entire class of jobs. The fact that Kaiser would allow the plaintiff to work as a general repairman in the machine shop, with what amounts to reasonable accommodation, does not transform the case into a question of whether he is disqualified from only one particular job. The question is whether the plaintiff's impairment would preclude him from an entire class of jobs, and not whether Kaiser would allow him to work in one capacity as a general repairman where he had access to mechanical aides. Dr. Casten, Kaiser's own company doctor, testified that plaintiff was physically unable to perform an entire class of jobs, *i.e.*, those involving "heavy labor," due to his back impairment. (Record, Vol. 2, pgs. 494-496) Additionally, Kaiser's own job description classifies this job as a heavy manual labor, and requires a general repairman, in any capacity throughout the plant, to be able to lift up to 70 pounds or more. That Kaiser would allow an exception to this job requirement if the plaintiff worked in the machine shop is of no moment.

Additional factors taken into consideration in determining whether an impairment substantially limits the major life activity of "working" are:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs) . . . 29 C.F.R. § 1630.2(j)(3)(ii)(A)(B).

The nature of plaintiff's impairment is degenerative disc disease, a condition not uncommon of those who have engaged in heavy manual labor over the course of a lifetime. (Record, Vol. 2, pg. 472) The severity of the plaintiff's condition is such that he is restricted from lifting over thirty pounds. This condition is permanent. (Record, Vol. 2, pg. 469) The practical affect of the condition is that without being afforded some reasonable accommodation, Emile Blouin is disqualified from performing medium to heavy manual labor for the remainder of his worklife. (Record, Vol. 2, pgs. 494-496) He is precluded by the very terms of Kaiser's job description from being a general repairman at its facility. He would be precluded from similar jobs at the various plants, refineries, shipyards and industry found in south Louisiana.

The Seventh Circuit's decision in *Cochrum, supra,* is directly on point. Therein, the plaintiff was restricted by his physician from heavy lifting, or pulling or pushing from his body, and from overhead work. The magistrate judge, before whom the parties had agreed to proceed, granted defendant's Motion for Summary Judgment. The magistrate held that the plaintiff did not establish that he had a "disability" within the meaning of the ADA, in that the plaintiff had "listed several other jobs he could perform in a coal mine", and that there were "many other types

of jobs" which the plaintiff's impairment would not preclude him from obtaining.

The Seventh Circuit disagreed. Referring to the exact same example of the bad back cited above from the Interpretive Guidance, the Seventh Circuit held:

> As with the example of the bad back in the regulations, Cochrum's shoulder injury could disqualify him from any position at the mine, or in related work such as construction. * * * But given the breadth of his physician's physical restrictions a reasonable jury could conclude that Cochrum's shoulder impairment does substantially limit his ability to work. *Supra* at 911.

Considering alone the statutory threshold question of plaintiff's entitlement to protection under the Act, it is abundantly clear that he currently suffers from an impairment which, in fact, substantially limits his ability to work in an entire class of jobs. At minimum, a genuine issue of material fact exists as to whether plaintiff's physical impairment substantially limits one of the major life activities, and the plaintiff should be allowed his day in court to prove it.

2. *Regarded as Being Disabled.*

Regardless of whether plaintiff suffers from an actual "disability," the facts of this case lead to the inescapable conclusion that Kaiser perceived the plaintiff as being unable to perform an entire class of jobs due to his back impairment. Carl Chauvin, plaintiff's direct supervisor, testified that the restrictions placed on plaintiff by Dr. Peter Casten prompted Kaiser to reassign plaintiff to "less strenuous" work. (Record, Vol. 2, pg. 504) Moreover, in response to plaintiff's Request for Admissions, defendant admitted the plaintiff's restrictions prompted them to remove plaintiff from the split shift crew. (Record, Vol. 2, pg. 506-507)

The Act's Interpretive Guidelines are directly on point. The Appendix to § 1630.2(*l*). Regarded as Substantially Limited in a Major Life Activity states:

> There are three different ways an individual may satisfy the definition of "being regarded as having a disability":
>
> (1) The individual may have an impairment which is not substantially limiting, but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

The Interpretive Guidance then gives this example of how an individual could establish this part of the definition.

> An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. *If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabling.*

The facts of this case point to only one reasonable conclusion: that Kaiser believed that if the plaintiff continued to work as a split shift repairman, performing strenuous work, that he would injure himself. Kaiser admitted this in its Answer to Requests for Admissions. Plaintiff's supervisor testified to this. Kaiser believed that plaintiff was unable to perform work that would be classified as "heavy work" because of a fear that he would injure himself. Kaiser reassigned him on the basis of that belief. (Record, Vol. 2, pgs. 472-473) Thus, even if the plaintiff's impairment was not substantially limiting, the fact remains that Kaiser reassigned him under the belief that it was. As in the example given in the Interpretive Guidance on Title I of the ADA, plaintiff has satisfied the

definition of "regarded as having a disability". It was error for the court to conclude otherwise.

Plaintiff directs this Court's attention to *Scharff v. Frank*, 2 Ad. Cas. 477 (BNA) (U.S.D.C. Southern District of Ohio 1991). (Record, Vol. 2, pgs. 508-512) As in the case at bar, defendants there admitted that plaintiff suffered from an impairment, but claimed that their perception of that impairment was only that it limited the plaintiff in performing the specific job of letter carrier. Therefore, defendants argued that plaintiff was not substantially limited in the major life activity of working. *Scharff, supra* at 479. (Record, Vol. 2, pg. 510) In response, the plaintiff argued that *if* defendant's assessment of the physical limitations were correct, then the practical result would be that she would be unable to perform approximately one-half of the jobs in the local economy for which she would otherwise be qualified.

As in the case at bar, plaintiff made this showing by use of a vocational rehabilitation expert to quantify the jobs from which plaintiff would be disqualified if the perceptions of defendant were true. *Id.* Specifically, the plaintiff in *Scharff* was given a thirty-five pound lifting restriction and limited to three hours a day of continuous walking. *Scharff, supra* at 480. Based upon these restrictions, the Court noted:

> [A]ssuming that the plaintiff has the physical impairments that she is regarded as having by the defendants, the plaintiff's vocational expert estimates that plaintiff would be prevented from performing approximately half of the unskilled jobs in the local economy as she would otherwise be qualified to perform.
>
> * * * *
>
> We conclude that the plaintiff qualifies as a 'handicap person' under the Rehabilitation Act because the defendant regarded her as having a physical impairment which substantially limits her ability to work. . . . Plaintiff's vocational expert indicated

> that the plaintiff would be precluded from performing a wide range of jobs if her ability to perform a physical task was limited in the manner described by Dr. Jonsyn.

Scharff, supra at 481. (Record, Vol. 2, pg. 512)

The precise rationale cited above, applies herein. If the restrictions assigned to plaintiff by Dr. Casten were "regarded as" accurate by Kaiser, which the facts of this case clearly demonstrate they were, then it necessarily follows that plaintiff would be precluded, at a minimum, from engaging in an entire class of jobs, i.e., those involving heavy labor. Plaintiff would also be disqualified from jobs classified as "medium work" and "medium-heavy work".

Plaintiff submits that *E. E. Black, Ltd. v. Marshall,* 497 F.Supp. 1088 (U.S.D.C. Hawaii 1980), and its progeny, set the standard for when a perceived disability substantially limits one in the performance of a class of jobs. There, as in the case at bar, plaintiff's congenital back impairment, in the opinion of defendant's doctor, placed the plaintiff at a "poor risk" for heavy labor. *E. E. Black, Ltd., supra* at 1091. However, precisely as what occurred in this case where the plaintiff consulted with Dr. Connolly, the plaintiff in *E. E. Black* consulted another doctor who believed that plaintiff's condition did *not* prevent him from performing the job of a carpenter. *E. E. Black, Ltd., supra* at 1091-1092. Plaintiff filed suit under the Rehabilitation Act alleging, among other things, that defendant regarded plaintiff as "disabled." Defendant there argued that plaintiff was limited in performing the specific job of a carpenter *only,* as opposed to an entire class of jobs. However, unlike the lower court in this case, the court in *E. E. Black* rejected this argument. Its rationale is particularly germane.

> [T]here is no doubt that Mr. Crosby either had an impairment or was regarded as having an impairment. The back problem that Black perceived in Mr.

> Crosby was a condition that "weakens, diminishes, restricts, or otherwise damages the individual's health of physical or mental activity." Black's perception was that the back problem weakened, diminished and restricted Mr. Crosby's physical activity. Black found that Mr. Crosby was unsuited for jobs involving heavy labor. Thus, he was clearly impaired or regarded as impaired.
>
> * * * *
>
> Had all firms offering similar positions involving heavy lifting been using the same criteria as Black, Mr. Crosby would have been disqualified from all such jobs. *E. E. Black, Ltd., supra* at 1101.

In the case at bar, plaintiff, like the plaintiff in *E. E. Black, supra,* was perceived as being unable to perform an entire class of jobs, not just one job in particular. Kaiser and its company doctor were of the belief that plaintiff could not perform any jobs that required lifting over thirty pounds. Considering the limitation on plaintiff's physical abilities as set forth by both Dr. Casten and Dr. Connolly, limitations which Kaiser clearly believed were accurate given its reassignment and restrictions on plaintiff's job, plaintiff would not have been able to obtain, from any employer, a job involving heavy manual labor.

3. *Collective Bargaining Agreement.*

The lower court seemed to indicate in its decision that the plaintiff should have pursued his remedies under the collective bargaining agreement as opposed to the ADA. First, it is important to note that the Collective Bargaining Agreement pre-dated the Act. Secondly, it does not address the question of whether the employee can perform his job *with reasonable accommodation.* Rather, the exclusive focus in the collective bargaining agreement is whether, in the opinion of a physician, a worker is medically able to return to work after an industrial injury. This was never contemplated for arbitrating

whether or not a worker was "disabled," or that is "substantially limited" by reason of an impairment.

The ADA was not in effect when the collective bargaining agreement was entered into by Kaiser and the labor union. However, even if it can be used to make the determination that a worker is medically "disabled," it still leaves completely unanswered the essential question raised by the ADA, or, that is, whether that disabled person can perform his job if he is given reasonable accommodation. A third-party doctor cannot make the determination. At most, a third-party doctor can only compare the plaintiff's restrictions to Kaiser's job description and render an opinion on those factors. Doctors are not "accommodation" experts.

Besides, 42 U.S.C. 12112(b)(2) prohibits a covered entity from using a relationship with a labor union as a means by which to avoid the mandates of the ADA. It provides in pertinent part,

> As used in subsection (a) of this section, the term "discriminates" includes—
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship can include a relationship with an . . . labor union);

In short, the ADA does not require a plaintiff to pursue available internal procedures prior to filing a charge of discrimination with the EEOC or a lawsuit. Similarly, a covered entity cannot hide behind a collective bargaining agreement as a means of accomplishing the discrimination prohibited by the ADA. Moreover, plaintiff, Emile Blouin, diligently pursued, without avail, the internal procedures available to him at Kaiser before filing a claim under the ADA.

II. THE LOWER COURT'S OPINION AND FIFTH CIRCUIT'S *PER CURIAM* DECISION CONFLICTS WITH DECISION OF SEVENTH CIRCUIT.

The lower court cited the Fifth Circuit's decision in *Dutcher v. Ingalls Ship Building,* 433 F.2d 723 (5th Cir. 1995), as support for its determination that the plaintiff was not substantially limited in performing an entire class of jobs. The Fifth Circuit, though not issuing a written opinion herein, did indicate that this was a correct result. This decision is in line with another Fifth Circuit case, decided on June 14, 1996, wherein it determined that the inability to lift forty-four to fifty-six pound containers was not a substantial limitation of a major life activity. *Ray v. Glidden,* 85 F.3d 227 (5th Cir. 1996). The Fifth Circuit in that case, also citing its decision in *Dutcher,* held as follows:

> But Ray can lift and reach as long as he avoids heavy lifting. *Dutcher* makes clear that inability to perform that discrete task does not render a person substantially limited in a major life activity. Supra at 229.

Between *Ducher, supra, Ray, supra,* and its *per curiam* decision in this case, it is clear, that the Fifth Circuit does not concede that a person who is precluded from engaging in heavy lifting is substantially limited in a major life activity. This is not only contrary to the Regulations which implement the ADA and the Interpretive Guidance on Title I of the ADA, but it is also in conflict with the decision of the Seventh Circuit in *Cochrum v. Old Ben Coal Co., supra.*

The facts of the case and the Seventh Circuit's holding on this point are set forth above. *Ante,* pp. 21, 22) In short, the lower court in *Cochrum* believed that while the plaintiff was restricted from working overhead, or from performing heavy lifting, pushing or pulling, that his impairment "does not come close" to substantially limiting

the plaintiff's working, to which the Seventh Circuit retorted:

> "We are not so sure. The 'Interpretive Guidance' accompanying 29 C.F.R. 1630.2(j) states"
>
> > An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, * * *. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, *e.g.*, the class of semi-skilled jobs.
>
> * * * *
>
> As with the example of the bad back in the regulations, Cochrum's shoulder injury could disqualify him from any position at the mine, or in related work such as construction. * * * Cochrum has at least raised a genuine issue of material fact as to whether or not he is disabled under the ADA. *Supra* at 911.

Thus, the Fifth Circuit is of the same inclination as was the magistrate judge in *Cochrum,* with whom the Seventh Circuit disagreed. The lower court herein, and the Fifth Circuit in its *per curiam* decision and its decisions in *Dutcher* and *Ray,* holds that as long as the plaintiff in an ADA case can perform some other type of work, then that plaintiff is not disabled under the ADA. It is immaterial to the Fifth Circuit that the individual is unable by reason of his impairment from performing heavy labor. Plaintiff submits that an individual should not be under one set of rules in one part of the country, and yet a similarly situated individual be under a different set in

another part of the country. This is especially true with an Act of such importance and profound effect on the working people of this nation, as the Americans With Disabilities Act.

CONCLUSION

Plaintiff respectfully submits that this petition presents several issues of exceptional importance, not only to him, but also to working Americans all across the nation. The United States Congress determined that it was necessary to provide a clear and comprehensive national mandate to eliminate a form of discrimination.

Some courts, exercising the nearly absolute power to dismiss, following this Court's guidance in *Celotex, supra* and *Anderson, supra,* are avoiding this national mandate. One result is the derogation of the right to trial by jury granted litigants under the Civil Rights Act of 1991. Another result is the erosion of Congress' attempt to forge a national mandate. The Americans With Disabilities Act is not being applied in accordance with Congress' directive and instructions. There are inconsistent and strained applications of this act between the circuits.

Plaintiff beseeches this Honorable Court to grant writs herein, so as to have all courts construing the terms of the ADA in a like and equitable fashion.

Respectfully submitted,

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APPENDIX

[Filed Dec. 4, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30069

Summary Calendar

EMILE BLOUIN,
Plaintiff-Appellant,

v.

KAISER ALUMINUM AND CHEMICAL CORP.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(95-CV-503-N)

Before KING, JONES, and DEMOSS, Circuit Judges.

PER CURIAM: *

After reviewing the briefs and the record, we are persuaded that the district court reached the right result when it entered judgment for the defendant.

AFFIRMED.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

[Filed Jan. 18, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 95-0503

Section "N"

EMILE BLOUIN

versus

KAISER ALUMINUM & CHEMICAL CORP.

ORDER AND REASONS

Before the Court is defendant's motion for summary judgment. For the reasons set forth below, defendant's motion is GRANTED.

BACKGROUND

On January 9, 1994, plaintiff injured his back while at work at defendant's plant. The injury aggravated his degenerative disc disease, a preexisting condition. Plaintiff missed approximately six weeks of work as a result of the injury and returned to work on February 21, 1994. Plaintiff's doctor placed no work restrictions on plaintiff. Dr. Casten, defendant's plant doctor, examined plaintiff upon his return to work and placed certain work restrictions on plaintiff.[1] Two weeks later and after observing plaintiff perform his jobs, Dr. Casten placed additional work restrictions on plaintiff[2] which resulted in defend-

---

[1] No lifting over 40 pounds and no climbing straight ladders.

[2] No continuous stooping, crouching, bending; no lifting over 30 pounds; ground level work only.

ant reassigning plaintiff to work as a general repairman on the special crew, a position with the same job classification and same base salary of $30,000 as the position that he previously held as a split shift general repairman.[3]

On March 28, 1994, plaintiff filed a grievance under the Collective Bargaining Agreement ("CBA") contesting his assignment to the special crew. Under the CBA, plaintiff could assert his seniority rights to obtain the more lucrative assignment of split shift general repairman. On April 11, 1994, plaintiff provided defendant with a letter from his own doctor that released defendant from any work restrictions. Defendant's doctor, however, still recommended that plaintiff be subject to work restrictions and recomended that plaintiff undergo a functional capacity examination before he would consider releasing plaintiff from the work restrictions. Plaintiff initially refused to undergo that examination for three months and as a result his grievance was denied. After the eventual completion of the functional capacity examination, Dr. Casten reviewed the results and determined that plaintiff should not be reassigned to the split shift. In August 1994, plaintiff filed a second grievance with the union which also complained about his assignment to the special crew. Plaintiff refused to participate in a third party doctor arbitration as provided for by the terms of the collective bargaining agreement and as recommended by plaintiff's union representative.

Plaintiff worked as a general repairman on the special crew for nine months before retiring on December 31, 1994. Plaintiff's deposition testimony indicates that he retired because he could make more money at home being retired than he could while working as a special crew general repairman. On February 10, 1995, plaintiff filed this suit alleging violations of the Americans With Dis-

[3] As a general repairman on the split shift, plaintiff had significantly more opportunities to work overtime and to obtain shift differential pay. While working the split shift, plaintiff's annual income totaled approximately $60,000.

abilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). Defendant now moves for summary judgment.

ANALYSIS

A party is entitled to summary judgment upon a showing that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247, 106 S.Ct. 2505, 2510 (1986); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992); Fed. R. Civ. Proc. Rule 56(c). In making its determination as to whether summary judgment is appropriate, the Court must draw all justifiable inferences in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *Oliver Resources PLC v. International Finance*, 62 F.3d 128, 130 (5th Cir. 1995). To oppose a motion for summary judgment, the nonmovant cannot rest on mere allegations or denials but must set forth specific facts showing that there is a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-22, 106 S.Ct. 2548, 2552-53 (1986); *Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc.*, 55 F.3d 181, 184 (5th Cir. 1995); Rule 56(e). A material fact is any fact "that might affect the outcome of the suit under the governing law," *Anderson*, 477 U.S. at 248. If the opposing party bears the burden of proof at trial, the moving party does not have to submit evidentiary documents to properly support its motion, but need only point out the absence of evidence supporting the essential elements of the opposing party's case. *Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

ADA

In order to establish a violation of the ADA, a plaintiff must meet three criteria: (1) plaintiff must have a "disability;" (2) plaintiff must be qualified for the job; and (3) plaintiff must have been discriminated against because of the disability. *Tyndall v. National Educ. Centers*, 31 F.3d 209, 212 (4th Cir. 1994). The only issue before

the Court as to plaintiff's ADA discrimination claim is whether plaintiff had a "disability." The ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994). Plaintiff does not claim that he had "a record of impairment." Plaintiff does argue that he is entitled to coverage by the ADA because: either he did have an actual impairment that substantially limited a major life activity, or defendant regarded him as having such an impairment. Defendant concedes that plaintiff's degenerative disc condition constituted a physical impairment, but maintains that this impairment did not "substantially limit" plaintiff's "major life activities" and that plaintiff is not disabled as defined by the ADA. *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (physical impairment, standing alone, is not necessarily a disability as contemplated by ADA).

While the ADA does not define either "substantially limits" or "major life activities," the regulations promulgated by the EEOC under the ADA provide significant guidance. *Dutcher*, 53 F.3d at 726; *Bolton*, 36 F.3d at 942. "Major life activities" includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing learning and *working*." 29 C.F.R. § 1630.2 (i) (emphasis added). To substantially limit means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can

> perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. 1630.2(j)(1). Factors to consider in determining whether an impairment substantially limits a major life activity include:

> (i) the nature and severity of the impairment,
>
> (ii) its duration or expected duration, and
>
> (iii) its permanent or expected permanent or long-term impact.

29 C.F.R. § 1630. App., § 1630.2(j)(2). With regard to the activity of working:

> [S]ubstantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. 1630.2(j)(3)(i); *Dutcher*, 53 F.3d at 727 (inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to a substantial limitation of the activity of working); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1417 (10th Cir. 1992) (working does not necessarily mean working at the job of one's choice); *Bolton*, 36 F.3d at 944 (employer entitled to summary judgment on ADA claim where plaintiff failed to produce evidence showing significant restriction in ability to perform either a class of jobs or a broad range of jobs in various classes).

The Court finds as a matter of law that plaintiff did not have an actual disability as defined by the ADA. Plaintiff provides no evidence that his impairment significantly restricted him from performing a entire class of

jobs. Plaintiff maintains that he could have returned to his prior position as general repairman split shift. Plaintiff's deposition testimony indicates that he did not consider himself disabled and that he believed that he could perform his prior job. Plaintiff's own doctor placed no restrictions on his return to work. Plaintiff retained the ability to perform the duties of a general repairman at the same base salary that he had previously earned before his injury and did so for nine months after reassignment.

Although plaintiff lacked an actual disability, he is entitled to the ADA's protection if defendant regarded him as having an impairment that substantially limited his major life activity of working. 42 U.S.C. § 12102(2)(C). "Regarded as having such an impairment" means that the individual:

> (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairment defined in . . . [29 C.F.R. § 1630.2(h)] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1). The question once again becomes a matter of whether defendant's work restrictions substantially limited plaintiff's major life activity of working.

The Court finds that defendant did not "regard" plaintiff as having an ADA disability. There is no evidence that defendant considered plaintiff's impairment as substantially limiting or that defendant doubted plaintiff's ability to perform the duties of a general repairman. The evidence only suggests that defendant believed that plain-

tiff's impairment prevented him from performing the particular position of split shift general repairman. Defendant's work restrictions did not foreclose generally plaintiff from working as a general repairman and defendant continued to employ plaintiff as such until he voluntarily retired nine months later. *See Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (employer did not regard employee as handicapped[4] where employee could not meet demands of *particular* job; substantial limitation requires foreclosure generally of the type of employment involved). The Court finds that as a matter of law these restrictions did not rise to the level of substantially limiting plaintiff's major life activity of working. *See Dutcher*, 53 F.3d 723 (welder who could not climb, but who could still weld, not substantially limited in performing function of welding); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 n. 3 (6th Cir. 1985) (impairment that affects only a narrow range of jobs can be regarded as not reaching a major life activity or as not substantially limiting one); *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328, 1343 (S.D. Tex. 1987), *aff'd* 863 F.2d 881 (5th Cir. 1988) (unpublished opinion) (injured knee that prevented climbing did not constitute impairment that substantially limited major life activity even where plaintiff demoted to lower paying job which did not require climbing). Accordingly, defendant's motion for summary judgment as to plaintiff's ADA claim is granted.

Constructive Discharge

It is well settled in the Fifth Circuit that in order for an employee to recover back pay for lost wages beyond the date of retirement or resignation, the evidence must establish that the employer constructively discharged the

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[4] The Fifth Circuit has held that "handicap" under the Rehabilitation Act is defined substantially the same as "disability" under the ADA. *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993).

employee. *Jurgens v. E.E.O.C.*, 903 F.2d 386, 389 (5th Cir. 1990). To show constructive discharge, an employee must offer evidence that the employer made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign. *Barrow v. New Orleans Steamship Assoc.*, 10 F.3d 292, 297 (5th Cir. 1994); *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 740-41 (5th Cir. 1993). While such a determination depends on the facts of each case, the following factors are relevant (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not. *Barrow*, 10 F.3d at 297. Constructive discharge cannot be based upon an employee's subjective preference for one position over another. *Jett v. Dallas Independent School District*, 798 F.2d 748, 755 (5th Cir. 1986). Unlawful discrimination alone cannot constitute such an aggravated situation that a reasonable employee would feel forced to resign. *Id.* Nor will a mere change of position or job responsibilities, without more, constitute constructive discharge. *Epps v. NCNB*, 7 F.3d 44, 46 (5th Cir. 1993).

The Court finds as a matter of law that plaintiff's working conditions were not so difficult and unpleasant that a reasonable employee would have felt compelled to resign. Through the CBA, plaintiff had the means to address his disagreement with defendant's decision to reassign him to the special crew. Plaintiff continued to work for nine months at his reassigned position until his voluntary retirement. By his own admission, plaintiff retired not because of intolerable working conditions, but because he could make more money collecting retirement benefits. Nor did the alleged three incidents of harassment over the nine month period constitute such an intolerable working con-

dition that a reasonable employee would have felt compelled to resign. There is no evidence that plaintiff's reassignment was a "harbinger of dismissal." *See Stephens v. C.I.T. Group/Equipment Financing Co.*, 955 F.2d 1023, 1027-28 (5th Cir. 1992) (reassignment accompanied by aggravating factors of public humiliation, younger successor, demotion from head of department to sales position, requirement to train successor, continued reduction in responsibilities, salary reduction, continued questioning whether employee was going to quit). As a matter of law, defendant did not constructively discharge plaintiff. Accordingly, defendant's motion for summary judgment as to the issue of constructive discharge is granted.

CONCLUSION

Plaintiff injured his back and, as a result, his employer placed certain work restrictions on him. These restrictions resulted in a reassignment to a different shift which effectively cut plaintiff's income in half. Understandably, plaintiff disagreed with defendant's decision to reassign him, but chose to retire and bring suit under the ADA instead of pursuing the remedies available to him through his collective bargaining agreement. Defendant's work restrictions did not rise to the level of generally foreclosing plaintiff from performing the duties of his job as general repairman.

For the reasons set forth more fully above,

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

New Orleans, Louisiana, this 17 day of January, 1996.

/s/ Edith Brown Clement
EDITH BROWN CLEMENT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 95-0503

Section "N" Mag. 1

EMILE BLOUIN

versus

KAISER ALUMINUM

AFFIDAVIT OF JENNIFER PALMER

BEFORE ME, personally came and appeared Jennifer Palmer who herein did depose and say that:

1. She is a certified vocational rehabilitation counselor and has qualified as an expert in this field in both state and federal courts within Louisiana.
2. The opinions expressed by her below are based upon the following:
   (a) That Emile Blouin did not graduate high school, and is currently 63 years of age;
   (b) That Emile Blouin worked at Kaiser Aluminum since 1957;
   (c) That for the last twelve years, Emile Blouin has worked as a split shift general repairman;
   (d) That according to the Job Tasks Analysis for a General Repairman at the Kaiser Aluminum Gramercy Works, a split shift general repairman could be required on occasion to lift up to seventy pounds;

(e) That based upon the physical restrictions assigned to Emile Blouin by Dr. Peter Casten, due to a degenerative disc condition, Emile Blouin is presently and permanently incapable of engaging in work that may require lifting, pushing, or pulling weights in excess of thirty pounds.

3. Based upon the above assumptions, as provided to me, I have conducted many labor market surveys and am familiar with the geographical area between Baton Rouge, Grammercy and New Orleans, Louisiana, which is the geographic area in which Mr. Blouin has lived and worked for the past twelve years.

4. Based upon this analysis, I am of the opinion that, given Emile Blouin's physical inability to perform lifting that would be categorized by the Department of Labor as heavy labor, he is substantially limited in his ability to find employment within the class of jobs for which he was otherwise qualified by reason of his work history, experience, and educational background, and in particular, that if he incapable of performing medium level work or heavier, as defined by the Department of Labor, that he experiences a loss of 83.9% to his relevant labor market.

/s/ Jennifer Palmer
JENNIFER PALMER

[Jurat Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 95-0503

Section "N" Mag. 1

EMILE BLOUIN,

Plaintiff,

VS.

KAISER ALUMINUM,

Defendant.

DEPOSITION OF: DR. PETER CASTEN

STIPULATIONS

IT IS STIPULATED AND AGREED, by and between the parties through their respective counsel, that the deposition of:

DR. PETER CASTEN,

may be taken before Mary F. Morgan, Commissioner, and Notary Public, State at Large, at the Center for Occupational Health, 2702 Hospital Drive, Northport, Alabama 35476, on the 12th day of December, 1995, commencing at 3:00 p.m.

* * * *

[56] Q Would you feel that an individual in 1992 with a herniated disk with radicular pain should have been under the same restrictions; that is, should exceed not—

should exceed lifting over 30 to 40 pounds, avoid repetitive bending, stooping, twisting?

A Yes. I believe that an individual who presents with pain and radicular leg pain in '92 is at significant risk of a recurring episode as he had in '94. And I think that he is at significant risk of a recurring episode again.

Q So my question is: Would it seem to you that between '92 and '94 one possibility that he went two years before he had a recurrent incident was because that he was unconsciously or subconsciously staying within—or he was avoiding—

A Heavy lifting.

Q —heavy lifting and avoiding the repetitive bending and stooping?

A I would think so.

Q And essentially, all you were telling Kaiser and Mr. Blouin is that based on all the [57] information you had—the MRI, the functional capacity evaluation, the clinical picture—that he should avoid any class of job that involves heavy lifting?

A That's correct.

Q And repetitive bending and stooping that he can't control.

A That's correct. But those type of activities would cause significant pain and send him back to Dr. Connelly.

Q That's all I have.

(END OF DEPOSITION)

PERTINENT TEXT OF REGULATIONS AND STATUTORY PROVISIONS

29 C.F.R. Part 1630 REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT.

29 C.F.R. § 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (42 U.S.C. 12101, et seq.) (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

* * * *

(g) *Disability* means, with respect to an individual—

(1) A physical and mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits*—(1) The *term substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of *working*—

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * * *

(*l*) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.

* * * *

29 C.F.R. § 1630.5 Limiting segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely effects his or her employment opportunities or status on the basis of disability.

APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

* * * *

Section 1630.2(i) Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing section 504 of the Rehabilitation Act at 34 C.F.R. part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.

* * * *

Section 1632.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. . . .

* * * *

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working For example, if an individual is blind, *i.e.*, substantially limited in the major life activity of seeing, there is no need to determine whether the individual is

also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial," These factors are:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). . . .

* * * *

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to

perform jobs in another class, *e.g.*, the class of semi-skilled jobs.

* * * *

Section 1630.2(*l*) Regarded as Substantially Limited in a Major Life Activity

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

* * * *

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

* * * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) Some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear, strong and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of the individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

* * * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12102. THE PUBLC HEALTH AND WELFARE CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12102. Definitions

As used in this chapter:

The terms "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * *

CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES SUBCHAPTER I—EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(4) Employee

The term "employee" means an individual employed by an employer. . . .

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purpose of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER I—EMPLOYMENT

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

* * * *

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association. . . .

* * * *